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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 409

THE BALTIMORE TRANSFER COMPANY, DAVIDSON TRANSFER AND STORAGE COMPANY, COCHRANE TRANSPORTATION COMPANY, ET AL.,
Appellants,

vs.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

STATEMENT AS TO JURISDICTION

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Appellants,

vs.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, The Baltimore Transfer Company, Davidson Transfer and Storage Company, Cochrane Transportation Company, Brooks Transportation Co., Inc., East Coast Freight Lines, Inc., and Bristow Lines, Incorporated submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the District Court entered in this cause on July 8, 1953. A petition for appeal is presented to the District Court herewith on , 1953.

Opinion Below

The opinion of the United States District Court is not yet reported. A copy is attached hereto as Appendix A.

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the decision in this cause is conferred by 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this cause: *United States* v. *Baltimore & O. R. Co.*, 293 U.S. 454; *Florida* v. *United States*, 282 U.S. 194; *Alabama Great Southern Railroad Co.* v. *United States*, 340 U.S. 216.

Questions Presented

The following questions are presented:

(1) Whether the Court in initially holding that the Administrative Procedure Act has not altered the rule of administrative finality erred in so holding particularly in that it failed to consider the effect of sections 8(b) and 10(e) hereinabove set forth, upon the administrative agency, the Court or the rule.

(2) Whether the Court erred in its interpretation and application of the rule of administrative finality particularly in that it failed to determine the nature and existence of the basic, essential, material and "quasi jurisdictional" facts, issues, findings and conclusions essential to the validity of administrative Orders.

Statutes Involved

The pertinent provisions of the Interstate Commerce Act, 49 Stat. 543; U.S.C., Title 49, secs. 301 to 327, as amended, and of the Administrative Procedure Act, 60 Stat.

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237, as amended; 5 U.S.C., secs. 1001 through 1011, are as follows:

Interstate Commerce Act

Sec. 5(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise;

Sec. 5(2)(b) Whenever a transaction is proposed under sub-paragraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission * * * and shall afford reasonable opportunity for interested parties to be heard. If the Commisison shall consider it necessary, in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; * * * If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *"

Administrative Procedure Act

Sec. 8(b) Submittals and Decisions—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Sec. 10(e) Scope of Review—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the

reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.

Statement

By joint application filed February 6, 1950 in the proceedings before the Interstate Commerce Commission entitled MC-F-4437, *Thomas J. Lyons—Control—Quinn Freight Lines, Inc.—Purchase—Jesse B. Wadkins and Thomas Fereol Neale (Agnes B. Neale, Administratrix)*,[1] Quinn sought approval by the Commission under Section 5 of the Interstate Commerce Act of its purchase of the operating rights and property of Neale[2] and the operating rights of Wadkins.[3] Thomas J. Lyons sought concurrent authority under the same section to acquire control of the operating rights and property heretofore referred to through the proposed purchase. This joint application was set for hearing before Examiner M. L. Winson, who thereafter submitted a proposed Report approving the application. Division 4 of the Commission, on April 25, 1952 adopted, without change, the proposed report of the Examiner and approved

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[1] The Interstate Commerce Commission, Quinn Freight Lines, Inc., Jesse B. Wadkins and Thomas F. Neale (Agnes B. Neale, Administratrix) are hereinafter referred to as Commission, Quinn, Wadkins and Neale.

[2] Neale is authorized by virtue of a certificate of public convenience and necessity issued by the Commission on August 18, 1947, Docket No. MC 44054, to transport general commodities over regular routes, between Reedville, Virginia and Baltimore, Maryland, via Tappahannock and Fredericksburg, Virginia and Washington, D. C.; between Warsaw, Virginia and Baltimore, Maryland via Glen Burnie, Maryland; and between T. B., Md. and Washington, D. C., serving all intermediate and off route points located in Northumberland, Lancaster, Richmond, Westmoreland, and King Counties, Virginia.

[3] Wadkins, by virtue of a certificate of public convenience and necessity issued October 29, 1940, Docket No. MC 61118, is authorized to transport general commodities over a regular route, between Washington, D. C. and Richmond, Va., via Fredericksburg, Va. over U. S. Highway 1 serving all intermediate points and certain off route points.

the application by its Order of the same date. This action of Division 4 was subsequently confirmed by the full Commission. Plaintiffs at each level of this administrative action filed appropriate briefs and petitions requesting the Commission to make specific findings on certain issues and particularly with respect to the alleged dormancy of the Neale rights between Baltimore and Washington with respect to the effect of the illegal operations of Quinn between Baltimore and Washington. The Commission made the following specific findings and conclusions but ignored completely Plaintiffs repeated requests for findings and conclusions on the latter two issues: (1) there is no evidence of any dissatisfaction with or deficiency in the service of the opposing carriers, (2) they are capable of handling additional traffic, (3) competition in their territory is substantial and Vendors' operations have been of little or no consequence as far as they are concerned, (4) the traffic interchange arrangement between Quinn and Neale relating to Baltimore-Washington traffic was not a genuine interchange arrangement, that such arrangement was not consonant with the rules prescribed in *Lease and Interchange of Vehicles by Motor Carriers*, 52 MCC 675 and that such arrangement was initiated after the agreement to purchase, (5) that operations had at all times been actively and consistently conducted under Neale's certificate without regard to the interchange arrangement between Quinn and Neale, (6) that it is quite likely that Quinn, an aggressive carrier. will divert some freight from competitors, (7) the main objective of the transaction is to extend Quinn's operation from Baltimore to Washington and Richmond and points in Maryland and Virginia for the purpose of providing a single-line through service between points in Massachusetts and those in the considered territory, (8) the primary objective of Quinn is to secure "overhead" rights, but it would

also afford service under the Neale and Wadkins rights consistent with demand therefor, (9) Neale handled 2,597 interstate shipments between Baltimore and Washington, on the one hand and on the other, ten authorized principal points in Virginia, (10) Neale's rights between Baltimore and Washington link the Quinn rights with Wadkins between Washington and Richmond.

The Commission made the following conclusions: (1) with respect to diversion of traffic from competitors, that this result, standing alone, is not a sufficient reason for denying this application, (2) . . . the proposed operation would not so harm the opposing carriers as to impair their ability to continue performing their operations as a common carrier, (3) the authority to purchase the operating rights of Wadkins should not be exercised unless and until the purchase of the rights and property of Neale is first or concurrently consummated, (4) the approval of the proposed transaction would be consistent with the public interest.

As heretofore stated, Plaintiffs, at every appropriate stage of the proceedings before the Commission, requested a finding and conclusion with respect to the question of the dormancy of the Neale authority between Baltimore and Washington. This continued request was totally ignored by the Commission. Plaintiffs also requested that a conclusion be made with respect to the alleged illegal operations of Quinn between Baltimore and Washington resulting from finding 4. The Commission refused to make any conclusion on this issue. As a result of these failures to act, this action was commenced in the District Court.

The District Court dismissed the complaint of Plaintiffs which sought to enjoin and set aside the Commission's Order of April 25, 1952 herein complained of for the reasons that: (a) the Administrative Procedure Act has not altered the rule of administrative finality, citing *Universal Camera*

Corp. v. *National Labor Relations Board*, 340 U.S. 474, (b) that the Commission was required to make only the two following basic findings: (1) whether the proposed purchases were within the scope of Section 5 (2) (a) of the Interstate Commerce Act and (2) whether these transactions would be consistent with the public interest, (c) that there was substantial support in the evidence for the finding that the transactions would be consistent with the public interest citing in support thereof the interchange arrangement between Quinn and Neale, found by the Commission to be not genuine (see finding 4), and also the unsatisfactory interline service performed by Quinn for the public, (d) with respect to the Commission's finding pertaining to the diversion of freight from plaintiffs and others, that the same is not inconsistent with the public interest if the approval of the transaction would provide an improved service even though it would affect adversely the revenue of a protesting carrier, (e) that the Commission did in fact make findings and conclusions pertaining to the dormancy of the Neale rights between Baltimore and Washington citing in support thereof findings (4) and (5) above, (f) that the Commission did in fact state its conclusion with respect to finding (4), and (g) that plaintiffs' complaint directed to the Commission action in granting authority to Quinn to temporarily operate the rights of Neale and Wadkins, not now complained of, was wholly without merit.

The Questions Presented by This Appeal Are Substantial

This appeal presents two substantial questions which have been decided by the District Court contrary to and inconsistent with the decisions of this Court, the provisions of the Administrative Procedure Act and of the Interstate Commerce Act.

The first question presented is whether the District Court in initially holding that the Administrative Procedure Act

has not altered the rule of administrative finality erred in so holding particularly in that it failed to consider the effect of sections 8(b) and 10(e), hereinabove set forth, upon the administrative agency, the Court or the rule.

The Congress of the United States assuredly did not envision an administrative or court ruling that it was performing a useless and unnecessary task when it enacted into law the Administrative Procedure Act and particularly sections 8 (b) and 10 (e) of that Act. The District Court, in its determination of this action has held that regardless of its intent, the Congress of the United States did in fact perform a useless and unnecessary task when it enacted into law the Act and the particular sections thereof herein cited. From this holding by the Court flows the errors assigned and submitted herewith.

The second substantial question involved is whether the District Court erred in its interpretation and application of the rule of administrative finality in that it failed to determine the nature and extent of the basic, essential, material and "quasi jurisdictional" facts, issues, findings and conclusions essential to the validity of administrative Orders. Plaintiffs repeatedly presented two basic and material issues and questions to the Interstate Commerce Commission requesting it to make specific findings and conclusions thereabout, the same being basic, essential, material and "quasi jurisdictional" findings and conclusions essential to the validity of its Order. The Commission failed and refused to comply with these requests. The District Court had before it all necessary papers, records and documents from which to determine the issues but erred in three specific particulars, viz: (a) in failing to determine that no findings or conclusions were in fact made as to the questions and issues presented, (b) in not determining whether such issues were basic, essential or material to the correct ultimate conclu-

sion required to be made, and (c) in failing to review the evidence on the record as a whole to establish the invalidity of such findings or conclusions as might have indicated compliance with plaintiffs' requests for the same.

Plaintiffs are of the firm belief that the questions presented are substantial and of real interest not only to the motor carrier industry of which plaintiffs are a part, but to all persons and industries who must of necessity appear before administrative agencies of the Congress of the United States.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

THE BALTIMORE TRANSFER COMPANY, DAVIDSON TRANSFER AND STORAGE COMPANY, COCHRANE TRANSPORTATION COMPANY, BROOKS TRANSPORTATION CO. INC., EAST COAST FREIGHT LINES, INC., AND BRISTOW LINES, INCORPORATED,
Plaintiffs,

vs.

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA,
Defendants

OPINION—June 30, 1953

Before SOPER, Circuit Judge, and COLEMAN and CHESNUT, District Judges

COLEMAN, Judge:

This is an action brought under Sections 1336, 2284, and 2321-25, Title 28, U. S. Code, to vacate and set aside certain orders of the Interstate Commerce Commission issued in proceedings under Sections 5 and 210 a (b) of the Interstate Commerce Act (49 U. S. C. 5 and 310 a (b)), approving the purchase by one motor carrier of the operating rights of two other motor carriers and granting, pending consummation of such purchase, temporary authority to the purchasing carrier to lease the operating rights of one of the other carriers.

The material facts with respect to the proceedings before the Commission which led up to the present suit are as follows: The Commission, acting on an application filed on February 6, 1950 under Section 5, approved and authorized the purchase by Quinn Freight Lines, Inc., hereinafter referred to as "Quinn", for $16,000 the operating rights and six vehicles of Thomas F. Neale (Agnes B. Neale, Administratrix), doing business as T. F. Neale, hereinafter referred to as "Neale"; and for $10,000 the operating rights of

Jessie B. Wadkins, doing business as Ace Truck Lines, hereinafter referred to as "Wadkins", all of these parties being common carriers by motor vehicle in interstate commerce. In the same proceedings, the Commission, acting under Section 210 a (b), authorized Quinn to lease the operating rights of Neale pending final determination of the Section 5 application. This application showed that Quinn already held extensive authority from the Commission to operate as a motor common carrier of general commodities, including authority so to operate over regular routes between Boston, Mass., and Baltimore, Md.; that the Neale operating rights which Quinn proposed to purchase included the right to transport general commodities over regular routes between Baltimore, Md., and Reedville, Va., via Washington, D. C., and Fredericksburg and Tappahannock, Va., serving all intermediate and off-route points in five named Virginia counties; and that the Wadkins authority which Quinn sought to purchase was to transport general commodities over a regular route (U. S. Highway No. 1) between Washington, D. C., and Richmond, Va., serving all intermediate points.

The Commission referred the application to an examiner who, on June 28, 1950, submitted his proposed report recommending that the application be denied. The applicant filed exceptions to the proposed report, with the result that on April 12, 1951, the Commission, Division 4, entered its report and order approving the application. On May 17, 1951, the Associated Carriers of Virginia, hereinafter referred to as the "Association", petitioned for, and was granted, leave to intervene in the proceedings, alleging that it was an association composed of 11 motor carriers who were authorized by the Commission to transport general commodities between Baltimore, Md., Washington, D. C., and Richmond, Va. On July 3, 1951, on petition of the Association, and of E. J. Scannell, Inc., another motor carrier, the Commission vacated its previous order approving the application, and ordered the proceeding reopened and set for hearing. On August 16, 1951, the Commission entered an order granting another application that had been filed July 31, 1951, by Quinn and Neale under Section 210 a (b)

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of the Interstate Commerce Act (49 U. S. C. A. Sec. 310 a (b)) to lease the motor carrier properties and operating rights of Neale for a period not exceeding 180 days, upon terms and conditions specified in a lease agreement filed with the Commission. The consideration, terms of payment, etc. involved in both the proposed sale and the temporary lease, form no part of the present controversy. This order recited that it appeared to the Commission that failure to grant the application might "result in destruction of or injury to said properties or interfere substantially with their future usefulness in the performance of adequate and continuous service to the public." On August 31, 1951, the Association petitioned the Commission to reconsider and vacate this order, to which the applicants replied. On November 5, 1951, the Commission entered its order denying the petition for reconsideration. On January 17, 1952, on petition of Quinn and Neale, the Commission entered on order extending the temporary authority granted to Quinn to lease the Neale operating rights "until the application filed * * * under section 5 * * * is finally determined." Meanwhile this application under Section 5 had been referred to an examiner for hearing in which attorneys for the applicants and the Association participated, and, on January 7, 1952, the examiner had filed his report, proposing that the Commission approve Quinn's purchase of the Neale and Wadkins operating rights. The Association filed exceptions to the examiner's report, and the applicants filed their reply to the exceptions. On April 25, 1952, the Commission, Division 4, entered its report and order approving and authorizing the proposed transactions. Thomas J. Lyons—Control; Quinn Freight Lines, Inc.—Purchase —Jessie B. Wadkins and Thomas Fereol Neale (Agnes B. Neale, Administratrix) M. C. F. 4437.

The purpose sought to be achieved by Quinn, the vendee, is to extend operations from Baltimore to Washington and Richmond and various indicated points in Maryland and Virginia, for the purpose of providing a single-line, through service between points in Massachusetts and those in affected territory. Quinn is one of the larger motor carriers operating along the Eastern seaboard. Its corporate history

and operations have been fully reviewed by the Commission in previous proceedings. See Quinn Freight Lines, Inc.—Purchase—Marshall, 55 M. C. C. 767; 56 M. C. C. 487, and 57 M. C. C. 567. Quinn transports volume shipments of freight from Boston to Baltimore, destined to Washington, Richmond, and other points in Virginia. Since 1947, Neale, one of the vendors, has been authorized to operate, over regular routes, between Reedville, Va., and Baltimore, via Tappahannock and Fredericksburg, Va., and Washington, D. C.; between Warsaw, Va., and Baltimore, via Glen Burnie, Md.; and between T.B., Md., and Washington, serving all intermediate and off-route points in Northumberland, Lancaster, Richmond, Westmoreland, and King Counties, Va. Since 1940, Wadkins, the other vendor, has been authorized to operate, over a regular route, between Washington and Richmond, via Fredericksburg, over U. S. Highway 1, serving all intermediate points, the off-route points of Lorton, Occoquan, Bowling Green, Quantico, and Fort Belvoir, Va.. and those in the Washington commercial zone as defined in Washington, D. C., Commercial Zone, 3 M. C. C. 243. Wadkins now has pending an application to extend operations over short segments south of the Virginia-District of Columbia boundary line, and south from Fredericksburg. There are no operating rights under such application which may be acquired by Quinn, the vendee.

The following facts were found by the Examiner and adopted by the Commission; approximately 2½ million pounds of freight are handled weekly by Quinn through its Baltimore terminal, of which an estimated 700,000 pounds are destined to the Washington area, and an estimated 100,000 pounds move to and from points, involved in this proceeding, south of this area. The flow of traffic is predominantly southbound from Massachusetts. The tonnage moving through Baltimore is there interlined with several carriers including Neale, the volume with the latter averaging some 500,000 pounds weekly.

In the course of interchange, shipments are delayed by one day. Also, when at times they are misplaced, there is delay and difficulty in tracing them and damage to the

freight increases with the frequency of handling. From five to eight days are consumed in completing deliveries of shipments originating in Boston, destined for Richmond. Under the proposed unified rights the lapsed time would be reduced to two or three days between these points, and first morning service would be afforded between Boston and Washington on truck loads, and first afternoon or second morning service would be afforded on less-than-truckloads because of the elimination of interchange, including the entire volume with Neale. Under the proposed unification, terminal facilities would be established in Washington, Richmond, and Callao, Virginia. Economy would result from the elimination of labor and re-billing, and the reduction in claims occasioned by interchange. The vendee would take over the vendors' employees.

The Association opposed the application on the ground that (1) the four carriers who instituted the proceeding were providing adequate service; (2) they had facilities for accommodating additional freight; (3) they were experiencing strong competition; and (4) Quinn would divert tonnage from them. On the other hand, applicants sought approval of the unification on the ground that unified service would be responsive to the requirements of shippers generally, and would enable the vendee to effectuate savings, thereby strengthening its financial status.

All of the present plaintiffs are motor carriers operating under individual certificates of Public Convenience and Necessity issued to them by the Commission for the transportation of freight within the areas involved in the proceedings before the Commission; and all of them were parties protestant in those proceedings. The operations of three of them, i.e. East Coast Freight Lines, hereinafter referred to as "East Coast", Baltimore Transfer Company, hereinafter referred to as "Transfer", and Brooks Transportation Company, hereinafter referred to as "Brooks", were set forth in detail in the Commission's findings from which we take the following: East Coast operates five days weekly between Richmond and New York City over regular routes, serving all intermediate points and certain off-the-route points, with service out or

north of Washington, except to Baltimore, restricted to pick-up southbound and delivery northbound, and service south thereof restricted to pick-up northbound and delivery southbound; and also service at Baltimore is restricted purely to traffic to or from points south of Alexandria. East Coast utilizes some 37 tractors, 41 trailers, and a number of trucks and maintains terminals in Richmond, Washington, Baltimore and other points. It affords overnight service between Richmond and Baltimore, averaging daily three trailer loads southbound and from three to six northbound. It interchanges New England traffic usually at New York City and occasionally at Baltimore, giving third morning service. While its vehicles normally operate at capacity, it is in a position to handle additional tonnage. Transfer operates over a regular route between Petersburg, Virginia and New York City, serving certain intermediate and off-route points, including Alexandria, Virginia, Petersburg, and Washington, as well as points between five miles of each, and Baltimore and points within ten miles thereof. Transfer uses 51 trucks, 149 tractors, and 221 trailers, with terminals in Richmond, Washington, Baltimore and other points. It usually renders overnight service. During the first six months of 1951 Transfer handled over 55,000 tons of freight with the resulting revenue of over $800,000, which would be subject to substantial competition from vendee on tonnage moving between Baltimore and Richmond, between New York City Metropolitan area and Richmond, and also between the same area and Washington. Transfer interchanges New England traffic at New York City, Jersey City, New Jersey, and occasionally at Philadelphia. It conducts a successful business in spite of the fact that there are substantial carriers whose routes practically parallel its own. It has not had any competition from the present vendors. Brooks operates principally over regular routes between New York City and Winston-Salem, North Carolina; Philadelphia, Baltimore, Washington, Fredericksburg, Richmond and Lynchburg, serving all intermediate points and certain off-route points and those within 45 miles of Washington and 30 miles of Columbus Circle, New York. Brooks uses 41 trucks, 177 tractors, 250 trailers and maintains terminals in Richmond, Fredericksburg, Wash-

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ington, Baltimore and other points. Between Richmond and New York City and intermediate points Brooks performs a daily overnight service. Brooks receives comparatively small tonnage in interchange from vendee, and its transfer of shipments to the latter has been small. It experiences competition from many carriers but not from vendors. It opposes the proposed unification on the ground that it would possibly lose some traffic between Richmond and Baltimore and Washington.

Five shippers testified before the Examiner in support of the application. They are all located in Boston or other Massachusetts points. They ship to Washington, and Virginia points. Vendee handles the freight from all of these shippers to Baltimore and there interlines it with a connecting carrier.

The Commission found there was no evidence of any dissatisfaction with or deficiency in the service of the opposing carriers, and also that they are capable of handling additional traffic. Competition in their territory is substantial, but Neale's and Wadkins' operations have been of little or no competitive consequence so far as opposing carriers are concerned. Nevertheless, Neale and Wadkins have conducted operations within the scope of their rights, and have rendered service on the scale commensurate with their financial resources, equipment and other facilities and traffic tendered them. The opposing carriers do not serve directly a very large portion of the area in the five Virginia counties embraced in Neale's certificate. They have no interline freight with vendors and not much with Quinn, the vendee, Brooks having received only some 80,000 pounds from the latter between January 1 and June 30, 1951. Complete data was not given with respect to the volume of New England tonnage which East Coast and Transfer interline. Out of more than three and one-half million pounds transported by Brooks to or from Richmond, on three days in 1951, only a little more than 100,000 pounds originated at or was destined to points in Connecticut, Massachusetts and Rhode Island. The bulk of vendee's tonnage originates in Massachusetts, and the opposing carriers have shared very little in the portion moving into Vendors' territory.

The operating ratios of the first nine months of 1951 of East Coast and Transfer were slightly below 90, and that of Brooks was 95.1, the latter's ratio having improved by 1.5 over that of 1950.

The Commission found that while it is quite likely that Quinn, the vendee, being an aggressive carrier, will divert some freight from the opposing carriers, this fact alone is not sufficient reason for denying the application; and weighing the evidence on both sides the Commission stated it was not convinced that operations by Quinn, the vendee, under the unified rights would so hurt the opposing carriers as to impair their ability to continue performing their obligations as common carriers. Accordingly, the Commission found that the proposed transactions would be consistent with the public interest.

The opposing carriers also assert that the Commission was without statutory authority in granting temporary approval of Quinn's leasing the Neale operating rights without first giving notice to them, the opposing carriers, of the filing of the temporary authority application; and also that, in any event, the granting of such authority was unsupported by the evidence. Plaintiffs have put in evidence, in the present proceeding, a certified transcript of the entire proceedings, including all the evidence before the Commission.

We are thus presented with two major questions for decision: First, whether the Commission's orders approving the proposed purchases by Quinn from Neale and Wadkins are supported by adequate findings and substantial evidence; and (2) whether the Commission exceeded its statutory authority in granting temporary approval of Quinn's lease of the Neale operating rights because (a) notice was not first given to the plaintiffs and an opportunity afforded to oppose such approval; and (b) such approval, as it is claimed, was unsupported by the evidence.

Turning to the first of these questions, it involves the application of the rule of administrative finality, which is that if the Commission's order is based upon adequate findings which, in turn, are supported by substantial evidence, it cannot be disturbed by a court on review, even though the court might consider the Commission's action wrong, and

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against the weight of the evidence. Interstate Commerce Commission v. Union Pacific R. Co., 222 U.S. 541. The Supreme Court has held that this rule has direct application to action by the Commission on an application, as here, under Section 5 of the Interstate Commerce Act. McLean Trucking Co. v. United States, 321 U.S. 67; O. C. Wiley & Sons v. United States, 338 U.S. 902, affirming, per curiam, 85 F. Supp. 542. See also Virginia Stage Lines v. United States, 48 F. Supp. 79; Shein v. United States, 102 F. Supp. 320, affirmed per curiam, 343 U.S. 944. In the McLean Trucking Co. case, supra, the Court, in approving an order of the Commission authorizing the merger of several motor carriers under Section 5, said (321 U.S. at pp. 87-88): "* * * Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' (Citing cases.) If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order."

The Administrative Procedure Act (5 U.S.C.A. Secs. 1001 et seq.) has not altered the rule of administrative finality. Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474.

Plaintiffs make the sweeping contention that the Commission's order of April 25, 1952, is "inconclusive of the issues, arbitrary, capricious, discriminatory, premature, contrary to provisions of law and the evidence, and unsupported by the evidence." But we find this contention to be wholly without merit. The Commission was required to make only two basic findings: (1) whether the proposed purchases by Quinn from Neale and Wadkins of their operating rights were within the scope of Section 5 (2) (a) of the Act; and

(2) whether these transactions would be consistent with the public interest. Alabama Great Southern Ry. Co. v. United States, 340 U.S. 216. We find that the Commission did make affirmative findings on both of these points, although the first is not in issue, since we do not understand that the plaintiffs question the Commission's authority under Section 5 to authorize transactions of this character. As to whether there is substantial support in the evidence for the finding that the transaction would be consistent with the public interest, there can be no doubt from an examination of the testimony as a whole. Detailed analysis of the evidence is believed to be unnecessary. Suffice it to point out, for example, that it stands without any proof to the contrary that of the freight interlined by Quinn with other carriers at Baltimore during the first half of 1951, an average of about 500,000 pounds weekly was interlined with Neale for further transportation to Washington, D. C., and points in Virginia which Neale was authorized to serve; that interchanging such traffic at Baltimore causes considerable delay in its delivery, requires the unloading and reloading of many shipments at Baltimore, involves six handlings of a less-truckload shipment moving from Boston to Washington, as against only four which a single-line movement would require, and that such extra handling frequently results in damage to shipments, and in loss and damage claims by Quinn against the interline carriers.

Another contention made by plaintiffs is that approval of the proposed transactions will enable Quinn to divert business from the plaintiffs which they now enjoy which would injure them and therefore would not be in the public interest. As to this, suffice it to say that it is not inconsistent with the public interest if, in order to provide the public with improved service, such would affect adversely the revenue of a protesting character. See Trans-American Freight Lines, Inc.—Purchase—Harold D. Gorman, 5 M.C.C. 712; Super Service Motor Freight Co., Inc.—Purchase—Selman & Junkins, 45 M.C.C. 432; N.C. Purdie Corp.—Purchase—Hoffman's Motor Transportation, 57 M.C.C. 790. As heretofore emphasized, the question for this Court to decide is not whether, on like testimony this Court would have made a

similar ruling, but simply whether the Commission's decision was based upon adequate findings, supported by substantial evidence, as to which the answer is clearly "yes".

Other points stressed by the plaintiffs are that the Commission failed to make any finding or conclusion with respect to the alleged dormancy of the Neale rights between Baltimore and Washington, and also as to whether Quinn had been engaging in unlawful operations between Baltimore and Washington, i.e. through unauthorized control by him of the operations of Neale from March 1950 to August 1951, and which plaintiffs claim, since such was the fact, required the Commission to deny the application for the purchase by Quinn. However, the Commission did make findings and conclusions on both of these points, as evidenced by the following quotation from pages 15 and 16 of its Report: "Traffic was interlined at Baltimore with vendee and other carriers. Vendee commenced interchanging with the administratrix in March of 1950, several months after executing the agreement to purchase the rights. According to an exhibit filed after the hearing, they interlined at Baltimore 416 shipments during the first six months of 1951, of which 366 consisted of paper moving from Lawrence, Mass., to Washington, 49 of skids from Washington to Lawrence, and 1 of oysters from Kilmarnock, Va., to Boston. Of the total shipments, 381 were transported from the point of origin to the point of destination in vendee's vehicles operated by its drivers. As to the remaining 35 shipments, the association's counsel, who examined the underlying data, assumes that the payments made by vendee to the administratrix were 'for the use of the Neale rights,' and not for actual transportation by the latter. It is clear that there was no genuine interchange in respect of the 381 shipments and that the arrangements between applicants were not consonant with the rules prescribed in *Lease and Interchange of Vehicles by Motor Carriers*, 52 M.C.C. 675. Moreover, such arrangements were initiated after the agreement to purchase. *The fact remains, however, that operations have at all times been actively and consistently conducted under Neale's certificate without regard to the above arrangements with vendee. The administratrix is unable to*

continue the operations because she has a young child and requires medical care, and the court having jurisdiction of the decedent's estate is pressing for settlement." (Emphasis supplied).

In contending that, because of the finding of unlawful control, the Commission was bound to deny the application, plaintiffs counsel relies upon the case of Kolowich—Control—Detroit and Cleveland Navigation Co.—Control—Denver—Chicago Trucking Company Inc., M. C. F. 4841. However, the facts there were distinctly different. Also, it is to be noted that the Commission said (p.): "We have frequently denied applications where the evidence showed that the parties had already effectuated control of the carriers involved in violation of Section 5. (Citation of cases omitted.) *It is true that we have stated that each such case must be determined on the basis of its own record, and we have granted the applications in some such cases on the ground that the public interest is paramount and that the applicants had clearly met their burden of proving that the control for the future would be consistent with the public interest.*" (Emphasis supplied.) The Commission then explained that, on the facts before it, the applicants had failed to establish affirmatively that the public interest would best be served by approval, and therefore the Commission refused to sanction the unlawful control.

The plaintiffs have raised several further points which they also claim are not supported by adequate findings and substantial evidence, but we do not understand they are seriously relied upon, and in any event we find the contentions made with respect to them not consonant with the actual findings of the Commission. Therefore, it is not believed necessary to consider these inconsequential points.

We come then to the second and final major contention of the plaintiffs, namely, that the Commission exceeded its statutory authority in granting temporary approval of Quinn's lease of the Neale operating rights, without first giving notice to the plaintiffs and an opportunity to object, and that in any event such approval was unsupported by the evidence.

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The order in question of August 16, 1951, was issued by the Commission pursuant to Section 210 a (b) of the Interstate Commerce Act, which provides that pending determination of a purchase application under Section 5 "the Commission may, *in its discretion*, and *without hearings or other proceedings*, grant temporary approval" for the operation by the proposed purchaser of the operating rights involved, "if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public." (Emphasis supplied.) The order recited, as the reason for granting the approval that it appeared that failure to grant such temporary approval might result in destruction of or injury to the properties involved or interfere substantially with their future usefulness in the performance of adequate and continuous service to the public. These findings of fact have substantial support in the evidence before the Commission. See exhibit submitted with the application for temporary authority which was sworn to by both Thomas J. Lyons and Mrs. Agnes B. Neale. This exhibit states the facts upon which it appeared to the Commission that the temporary approval applied for should be granted, which, basically, are to the effect that since the death of Thomas F. Neale his widow had been endeavoring unsuccessfully, with no previous experience, to carry on her husband's trucking business under court jurisdiction, in consequence of which she had not been permitted to replace equipment or to use funds of her husband's estate to develop the business. There was also testimony in part to the same effect at the hearing conducted only a few days before the application for temporary authority was filed. From the aforegoing we are satisfied that the order giving approval of the lease was based upon legally adequate findings, and that these findings were supported by substantial evidence.

Lastly, the Commission was not required to give notice to the plaintiffs before granting the temporary approval. Under the Act, Section 210 a (b), the Commission was

authorized, "in its discretion and without hearings or other proceedings", to act immediately on the application before it. The very purpose of this provision would be defeated if the Commission were required to postpone action upon such an application until the opposing parties could be notified and given an opportunity to submit their protests and offer contravening evidence. A mere notice of the application would be of no value to them unless they were permitted to be heard. See Alabama Great Southern Ry. Co. v. United States, 103 F. Supp. 223; Hudson River Day Line v. United States, 85 F. Supp. 225; Kansas City & Leavenworth Transportation Co. v. United States, 51 F. Supp. 916; Schenley Distillers' Corp. et al. v. United States, 50 F. Supp. 491.

It is not true, as counsel for plaintiffs contend, that the Commission specifically undertook to give them notice of all future proceedings and to afford them a right to participate therein. It is appropriate to point out that even though the plaintiffs did not receive notice of the filing of the temporary authority application until after the Commission had entered its order approving it, the plaintiffs, did, on August 31, 1951, file with the Commission their petition for reconsideration and vacation of the order. To that petition the applicants filed their reply of September 12, 1951, and the Commission, after giving due consideration to the representations of both sides, entered its order of November 5, 1951, denying the plaintiffs' petition. Thus it appears that the plaintiffs were afforded an opportunity to protest against the grant of temporary authority, that their protest was received and considered, and that the Commission nevertheless permitted its previous decision to stand.

For the aforegoing reasons the complaint will be dismissed.

William C. Coleman.

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No. 409

In the Supreme Court of the United States

OCTOBER TERM, 1953

THE BALTIMORE TRANSFER COMPANY, DAVIDSON TRANSFER AND STORAGE COMPANY, COCHRANE TRANSPORTATION COMPANY, ET AL., APPELLANTS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION OF THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. 6025

THE BALTIMORE TRANSFER COMPANY, ET AL., PLAINTIFFS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, DEFENDANTS

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellees Interstate Commerce Commission and United States of America move that the judgment of the District Court be affirmed.

This is a direct appeal from a final judgment, entered July 8, 1953, of a three-judge District Court convened pursuant to 28 U.S.C. 2284 and 2325, which dismissed a complaint seeking to set aside orders of the Interstate Commerce Commission. The appeal was allowed on September 4, 1953, and appeal papers were served upon appellees the same day.

Quinn Freight Lines, Inc. ("Quinn") is a certificated motor common carrier authorized to operate between Boston, Massachusetts, and Baltimore, Maryland. After full administrative proceedings unchallenged as to regularity, Division 4 of the Commission

approved an application under Section 5(2)(b) of the Interstate Commerce Act for Quinn's purchase of the operating rights of two other carriers: (1) Neale, authorized to operate between Baltimore and Reedsville, Virginia, through Washington, D. C., and (2) Wadkins, whose certificate covered operations between Washingeon, D. C. and Richmond, Virginia.[1] Under the integrated authority resulting from the Commission's order of approval, Quinn will provide single line service between Boston and points in the areas served by Neale and Wadkins. Appellants are competing motor carriers who serve some of these same points.

In approving the purchases as "consistent with the public interest" (Section 5(2)(b)), the Commission found that approximately one-third of the freight that moves through Quinn's Baltimore terminal is interchanged there with connecting carriers for shipment to points in Washington and Virginia; that elimination of such interchanges would reduce shipping time and misplacements of and damage to freight, and would effect savings through elimination of labor and rebilling and reduction in damage claims; that the opposing carriers (appellants) do not serve directly "a very large portion" of the Virginia area served by Neale, and have not interchanged any freight with Neale and Wadkins or much with Quinn; and that, although Quinn probably would divert "some freight" from appellants, such diversion would not impair their ability to continue performing their obligations as common carriers.

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[1] The Commission previously had granted Quinn temporary authority to lease Neale's operating rights pending Commission determination of their purchase. The temporary order of approval, which appellants challenged unsuccessfully in the district court, is not involved in this appeal.

A petition for reconsideration was denied by the entire Commission, and the district court, in a thorough opinion which carefully reviewed the evidence, unanimously sustained the Commission's order.

Appellants' 36 assignments of error raise no substantial questions justifying further review by this Court. They merely reiterate the contentions—fully considered and rejected by the district court—that the Commission's findings were insufficient and without adequate evidentiary support. As the district court held, the Commission's ultimate statutory finding that the proposed purchases "will be consistent with the public interest," together with the subsidiary findings and discussion in its report, plainly are adequate to support the order.[2] *Alabama Great Southern R. Co.* v. *United States*, 340 U.S. 216, 228. In reviewing the evidence, the district court considered both the evidence supporting and "the body of evidence opposed" to the Commission's view, *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488, and concluded that "the testimony as a whole" supported the Commission's conclusion. As the court correctly held, the question before it was not "whether, on like testimony this Court would have made a similar ruling, but simply whether the Commission's decision was based upon adequate findings, supported by substantial

---

[2] There is no merit to appellants' contention that the Commission failed to make findings on the "basic and material" issues of (1) the "dormancy" of Neale's rights between Baltimore and Washington (assignments of error 18-28), and (2) the alleged invalidity of Quinn's interchange with Neale (assignments of error 30-34). As the district court noted, the Commission expressly found that Neale had made a large number of interchange shipments between Baltimore and Washington-Virginia in 1950 and 1951, and that, despite the interchange agreement, these operations at all times had been "actively and consistently conducted under Neale's certificate."

evidence, as to which the answer is clearly 'yes.'"[3] In ascertaining where the public interest lay, the Commission had to balance the benefits to shippers from single line service against any disadvantage to Quinn's competitors. Cf. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 66. The determination of whether the public interest would best be served by approving or disapproving the transfer of operating rights under these circumstances is a matter peculiarly within the Commission's expert judgment, *McLean Truck Co.* v. *United States*, 321 U.S. 67, 87-88, which the courts will not overturn as long as it has a "rational basis." *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 287.

CONCLUSION

For the foregoing reasons, it is clear that this appeal presents no substantial question. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

ROBERT L. STERN,
Acting Solicitor General.

EDWARD M. REIDY,
Chief Counsel, Interstate Commerce Commission.

SEPTEMBER, 1953.

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[3] Contrary to appellants' contention, the Administrative Procedure Act did not change the rule of administrative finality that the Commission's findings, if supported by substantial evidence, are conclusive. It merely requires the reviewing court to determine such substantiality on the record as a whole, including "the body of evidence opposed" to the Commission's views. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488. As noted in the text, this was precisely the test applied by the district court in upholding the Commission's order.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 409

THE BALTIMORE TRANSFER COMPANY, DAVIDSON TRANSFER AND STORAGE COMPANY, COCHRANE TRANSPORTATION COMPANY, BROOKS TRANSPORTATION CO., INC., EAST COAST FREIGHT LINES, INC., AND BRISTOW LINES, INCORPORATED,
Appellants,

VS.

INTERSTATE COMMERCE COMMISSION
AND
UNITED STATES OF AMERICA,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

I. INTRODUCTION

Pursuant to the provisions of Rule 7, Paragraph 3, of the revised rules of the Supreme Court of the United States, Appellants, The Baltimore Transfer Company, Davidson Transfer and Storage Company, Cochrane Transportation

Company, Brooks Transportation Co., Inc., East Coast Freight Lines, Inc., and Bristow Lines, Incorporated, oppose the joint motion to affirm of the United States of America and the Interstate Commerce Commission.

II. STATEMENT

By joint application filed with the Interstate Commerce Commission, Quinn Freight Lines, Inc., Brockton, Mass. (Quinn), sought approval by the Commission under Section 5 of the Interstate Commerce Act of its purchase of the operating rights and property of Thomas F. Neale (Agnes B. Neale, Administratrix) (Neale) and the operating rights of Jesse B. Wadkins (Wadkins). By these two acquisitions, Quinn sought to extend its existing operating authority between Boston, Mass. and Baltimore, Md. to Washington, D. C. and Richmond, Va. The Neale authority sought to be acquired permits operations between Baltimore, Md. and Washington, D. C. and also between Baltimore, Md. and Reedsville, Va. and certain Va. counties, while the Wadkins' authority sought to be acquired permits operations between Washington, D. C. and Richmond Va. A combination of the two authorities sought to be acquired with Quinn's present authority would extend the lines of Quinn from Baltimore, Md. southward to Richmond, Va.

Quinn's main objective in the transaction submitted to the Commission for approval was to extend its operations from Baltimore, Md. to Washington, D. C. and Richmond, Va. (Sheet 7, Commission's Report and Order dated April 25, 1952, Plaintiffs' Exhibit 1). Neale's Baltimore-Washington rights link the Wadkins' Washington-Richmond rights with Quinn's present authority (Sheet 17, Plaintiffs' Exhibit 1). Further, if the transfer of the Neale certificate is approved, Quinn will also institute operations under this

certificate between Baltimore, Md. and Washington, D. C. (p. 339, Transcript of Testimony before the Commission).

Appellants are common carriers by motor vehicle authorized to transport and transporting general commodities in direct line service between New York, N. Y., Philadelphia, Pa., Baltimore, Md., Washington, D. C. and Richmond, Va., and points intermediate thereto, and by interchange arrangement transporting general commodities between these latter points and points north of New York, N. Y. served by Quinn. The approval of the proposed transaction would permit Quinn to institute single-line service, for the first time, in direct competition with Appellants, between Washington, D. C. and Richmond, Va., and points intermediate thereto, on the one hand, and on the other, Baltimore, Md. and Boston, Mass. and all intermediate points. The acquisition would also permit Quinn, for the first time, to institute a service, which had never heretofore been conducted by Neale, between Baltimore, Md. and Washington, D. C.

Having a direct interest in the proceedings before the Commission, Appellants appeared therein in opposition to the approval of the proposed transactions. At the very outset of these proceedings, Appellants realized that what Quinn was attempting to do was to link two additional operating authorities to its existing operating authority to permit through transportation south to Richmond, Va. The two links in this resulting authority would be the Neale rights between Baltimore, Md., and Washington, D. C. and the Wadkins' rights between Washington, D. C. and Richmond, Va. If the Commission refused to approve the transfer of the Neale Baltimore-Washington link, the entire transaction would fall (Sheet 19, Plaintiffs' Exhibit 1).

A hearing was held in these proceedings and an Examiner of the Commission issued his proposed Report approving the entire transaction. Appellants filed exceptions to this proposed Report pointing out that the Baltimore-Washington link (the Neale authority) had, as a matter of record, *never* been operated. Appellants requested the Commission to make a finding that these rights had never been operated and a conclusion that because public convenience and necessity warranting the reinstitution of this dormant service had not been proven, approval of the transaction should be denied. No findings or conclusions on this issue were made by the Examiner and on April 25, 1952, the Commission adopted the proposed Report of the Examiner, without change, and approved the transaction.

Appellants then filed a Petition for Reconsideration of this April 25, 1952 Order of the Commission, again alleging the absolute dormancy of the Baltimore-Washington link and requesting findings and conclusions on this issue. The Commission denied this Petition in its entirety on July 21, 1952 and failed to make the findings and conclusions requested.

Appellants thereafter instituted in the United States District Court for the District of Maryland, an action seeking to set aside the Order of the Commission dated April 25, 1952 on the basis that the Commission had failed to make any findings or conclusions with respect to the above material issue raised on the record. The District Court determined that findings had been made on this issue, citing statements in the Commission's Report and Order that: (1) Operations were conducted by Neale between Baltimore and Washington through an inter-change arrangement with Quinn and, (2) that operations have at all times

been conducted under Neale's certificate without regard to the interchange arrangement (pp. 13, 14, District Court's Opinion). Factually, in its Report and Order of April 25, 1952, the Commission concluded that this same alleged interchange arrangement referred to by the Court was not a genuine interchange, that it was not consonant with the Commission's Rules, that such arrangement had been instituted after the Agreement to purchase (Sheets 15 and 16, Plaintiffs' Exhibit 1), and did not consider operations under the interchange arrangement as operations of Neale. The second Commission statement referred to above, relied on by the District Court as a finding that Neale had actually conducted operations between Baltimore and Washington, is in the face of the *only* evidence of record that Neale, in fact, had never claimed to have conducted any such operations except under the abortive interchange arrangement with Quinn.

The *only* evidence in the record relating to the question of whether Neale had or had not conducted operations between Baltimore, Md. and Washington, D. C. appears in the form of a stipulation between Counsel for Appellants and Counsel for Quinn at page 152 of the Transcript of Testimony of the hearing before the Commission.[1]

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[1] Mr. Money (Attorney for Protestants): "I think there ought to be something stated about that. Also, in addition on these two exhibits that all the shipments transported under it, prior to the arrangement they had with Quinn, moved between these five Virginia counties, on the one hand, and on the other, Washington or Baltimore and that none of the shipments prior to the arrangement with Quinn moved between Washington and Baltimore, in either direction."

Mrs. Kelly (Attorney for Applicants at page 153): "As stated by Mr. Money, we have agreed that Mrs. Moss (Administratrix of the estate of Thomas Fereol Neale) would have testified the operations with Quinn have been *the only operations between Washington and Baltimore*, but she has also interchanged traffic with Quinn that originated at or was destined to points in Lancaster County." (Emphasis supplied.)

The District Court, in resolving the issues before it, adopted the following standard of judicial review of Orders of administrative agencies (pages 10, 11, 12 of the District Court's Opinion):

> *The questions presented involve the application of the Rule of Administrative Finality, which Rule is defined to be that if the Commission's Order is based upon adequate findings, which in turn are supported by substantial evidence, it cannot be disturbed by a Court on review even though the Court might consider the Commission's action wrong and against the weight of the evidence and that this Rule has not been altered by the Administrative Procedure Act, citing Interstate Commerce Commission v. Union Pacific RR. Co., 227 U. S. 541 and Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474.*

Applying this principle to the issues before it, the District Court determined that the Commission's Order of April 25, 1952 was valid and dismissed Appellant's complaint.

III. QUESTIONS PRESENTED

1. Whether the District Court in initially holding that the Administrative Procedure Act has not altered the Rule of Administrative Finality erred in so holding, particularly in that it failed to consider the effect of Section 8 (b) and 10 (e) of that Act upon the Administrative Agency, the Court, or the Rule.

2. Whether the District Court erred in its interpretation and application of the Rule of Administrative Finality, particularly in that it failed to determine the nature and existence of the basic, essential, material, and "Quasi Jurisdic-

tional" Facts, Issues, Findings, and Questions Essential to the Validity of Administrative Orders.

These questions and the issues raised by them are closely related and for that reason will be considered together.

IV. ARGUMENT

The District Court applied an incorrect standard of judicial review in determining whether the order of the Interstate Commerce Commission complained of was based upon adequate findings, which in turn were supported by substantial evidence.

Appellants contend that in this case, the District Court adopted an entirely incorrect standard of judicial review in resolving the questions presented to it, and as a result of adopting this incorrect standard, erroneously concluded that the Commission order complained of is valid.

A careful analysis of the Court's statement of its concept of the Rule of Administrative Finality, which was the standard by which all issues in the proceeding before it were judged, reveals that the District Court completely misapprehended the proper standard of judicial review to be applied in cases of this character. The District Court has further compounded its error by holding that the Administrative Procedure Act has not altered this incorrect standard. Appellants are at a loss to understand the District Court's citation of this Court's Opinion in *Universal Camera Corp. v. N. L. R. B.*, supra, as substantiation of the correctness of this standard of judicial review. Appellants submit that this is precisely the standard which this Court rejected in that case.

In the *Universal Camera* case, this Court was called upon to determine the effect of the Administrative Procedure

Act and the Taft-Hartley Act upon the standards to be applied by Courts in reviewing decisions of the National Labor Relations Board. This Court, in reaching its determination of the issues in this case, stated:

> "It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act. The Senate Committee which reported the review clause of the Taft-Hartley Act expressly indicated that the two standards were to conform in this regard, and the wording of the two Acts if for purposes of judicial administration identical. And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act."

This Court then referred to the existing standards of judicial review of administrative orders which had been adopted by various Courts and concluded that, in some instances, these standards were consistent with the intent of Congress as expressed in the Administrative Procedure Act and, in other instances, were not. Appellants contend that the standard adopted by the District Court in this case is squarely within that category of standards of judicial review rejected by Congress and by this Court. A comparison of the language used by the District Court in its definition of the Rule of Administrative Finality with the standard of judicial review which this Court rejected in the *Universal Camera* case reveals a startling similarity.

In essence, the District Court's Rule of Administrative Finality is that it was precluded from disturbing the Commission's Order even if the order was wrong and against the weight of the evidence, the Administrative Procedure

Act notwithstanding. In the *Universal Camera* case, this Court referred to its previous decision in *N. L. R. B. v. Nevada Consol. Copper Corp.*, 316 U. S. 105 and rejected the standard of judicial review set forth in that case which was that Courts are precluded from weighing evidence in reviewing orders of the National Labor Relations Board and they cannot set them aside even though different conclusions might have been reached.

This Court in the *Universal Camera* case concluded that as a result of the passage of the Administrative Procedure Act and the Taft-Hartley Act, the following standard of judicial review is applicable to Courts considering the correctness of administrative orders:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed upon the responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirements that evidence appears substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Court of Appeals. The Board's findings are entitled to respect; but they must, nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

In the case of *Chicago and Eastern Illinois RR. Co. v. U. S. et al.*, August 27, 1952, 107 F. Supp. 118; affirmed per

curiam 344 U. S. 917, the Statutory Three Judge Court demonstrated the proper concept to be applied by Courts in reviewing the correctness of orders of administrative agencies. In that case, the Court initially considered whether the requisite findings of fact necessary to support a Commission Order had been made and in this consideration gave full scope to Section 8 (b) of the Administrative Procedure Act. The Court held that the Commission is not relieved of its duty to make the basic or "quasi jurisdictional" findings essential to the validity of the order and stated that something more than an ultimate finding is necessary. Having found that the basic and essential findings essential to the validity of the Commission's Order were present, the Court then weighed the substantiality of the evidence supporting these findings. In reaching its conclusion that the Order of the Commission complained of should be upheld, the Court made the following pertinent statement which revealed a complete understanding of the proper principle to be applied in reviewing the correctness of Commission orders:

> "In view of the entire record, we cannot say that the Commission's finding is contrary to the weight of the evidence or without support of that 'quality of proof which induces conviction and makes an impression on reason', *N. L. R. B. v. Thompson Products*, 6 Cir., 97 F. (2d) 13, 15. We hold that this finding is supported by substantial evidence."

Appellants contend that if the District Court in the instant case had applied the same standard of judicial review and given full credence to the provisions of the Administrative Procedure Act it would have been required to reach a different conclusion.

There cannot be the slightest question that the Interstate Commerce Commission is subject to the provisions of the Administrative Procedure Act. *Riss and Co. v. U. S.*, 341 U. S. 907; *Universal Camera Corp. v. N. L. R. B.*, supra. Contrary to these decisions, the District Court has held that the Commission is not required to comply with the provisions of this Act and it follows that the District Court is in obvious error in this regard.

Adequacy of the Commission's Findings

Appellants, throughout the proceedings before the Commission and in the District Court, constantly and vigorously complained that the Commission had failed to make findings and conclusions on the material question of the complete dormancy of the Neale Baltimore-Washington link in the proposed transaction. In accordance with the rights granted them by the provisions of the Administrative Procedure Act (Section 8 (b)) Appellants filed Exceptions and subsequent thereto a Petition for Reconsideration requesting findings and conclusions on this material issue raised by them on the record. In this state of the record, Appellants contend that the Commission was required to make a finding on this dormancy issue, (1) because it was raised as an exception by these parties at the appropriate time in a proceeding before it and disposition of the question was required by the specific terms of the Administrative Procedure Act; (2) that the issue raised by Appellants was a material issue of fact, law or discretion presented on the record upon which findings and conclusions, as well as the reasons or basis therefor, were required to be made by the provisions of this Act and (3) that a finding on the question of dormancy is a basic and essential finding necessary to the validity of orders issued under Section 5 of the

Interstate Commerce Act when this question is raised in a proceeding before the Commission. The Commission failed to make any findings and conclusions on this issue.

The initial error of the District Court was its determination that findings adequate to support the validity of the Order of April 25, 1952 had been made by the Commission. This initial error flows directly from the Court's misapprehension of the correct standard of judicial review which has been referred to heretofore. The principal issue presented to the District Court by Appellants was whether or not the Commission had failed to make findings and conclusions on this dormancy question, which findings and conclusions were essential to the validity of the Order complained of. The Court, applying this incorrect standard, erroneously determined that findings on this issue had been made, basing its conclusion on statements contained in the Commission's Report that operations were conducted between Baltimore and Washington through an alleged interchange arrangement with Quinn and that operations have at all times been conducted under Neale's certificate without regard to this interchange arrangement. A review of the *entire* record in this proceeding conclusively proves that operations under this interchange arrangement could not and did not constitute operations by Neale for the reason that the arrangement was not genuine, was not consonant with the Commission's Rules, was instituted after the agreement to purchase and operations thereunder were held not to be operations by Neale in the Commission's Report. The statement that operations have at all times been conducted under Neale's certificate, without regard to this interchange arrangement, does not and cannot refer to operations between Baltimore, Md. and Washington, D. C. for the reason that such a conclusion is completely negated by the *only* evidence of record.

It is, therefore, apparent that the District Court did not review the record as a whole, including the evidence opposed to the validity of the Commission's action as required by the provisions of the Administrative Procedure Act, to determine the validity of the Commission's Order of April 25, 1952 and its failure to do so resulted in its erroneous conclusion that this Order was valid.

Further substantiation of the District Court's error in this regard is contained in its statement that the only basic finding required to be made by the Commission was consistency with the public interest, citing *Alabama G. S. R. v. U. S.*, 340 U. S. 216. "Consistency with the public interest" is the ultimate conclusion to be determined by the Commission in a proceeding under Section 5 of the Interstate Commerce Act, not a "basic finding" required to support this ultimate conclusion. For reasons heretofore stated, the District Court's conclusion that the only basic finding required to be made by the Commission was whether or not the proposal was consistent with the public interest is clearly in error and the error flows directly from the Court's misconception of the proper standard of judicial review. Appellants contend that the Commission was *required* to make findings and conclusions on the dormancy issue and having failed to do so, its Order of April 25, 1952 is invalid.

In spite of the Court's conclusions to the contrary, the Commission is subject to the provisions of the Administrative Procedure Act and was required to make the findings and conclusions requested by Appellants in the proceeding before it. If any doubt exists on this question, it is effectively dispelled by the statement of Representative Walter

of Pennsylvania when he outlined the purposes of Section 8(b) of the Administrative Procedure Act on the floor of the House of Representatives of the Congress on May 24, 1946:[2]

> "The second subsection of section 8 is a statutory statement of the right of the parties to submit for the full consideration of the presiding officers, first, proposed findings and conclusions, or second, exceptions to recommend decisions or other decisions being appealed or reviewed administratively and, third, supporting reasons for such findings, conclusions, or exceptions. The record must show the official rulings of the agency upon each such finding, conclusion, or exception presented. These provisions assure all parties an opportunity to present their views of the law and the facts and be heard thereon prior to the decision of any case. So that the parties and the reviewing courts may be fully apprised, all recommended or other decisions must include first, findings and conclusions, as well as the reasons or basis therefor, upon all the issues of fact, law, or discretion presented by the record and, second, the appropriate agency action or denial.
>
> The purpose and effect of these provisions are clear upon the face of the section. One matter should be emphasized. Section 8(b) requires findings and conclusions to be stated upon all the material issues of fact which the parties may present. This means that, within the legal framework of the type of case involved, the number and the subjects of the findings and conclusions will be determined by the record and by the legal, factual, or discretionary issues raised by the parties. The mere parroting of findings or conclusions in the words of statutes, however sufficient that may be as an ultimate conclusion, definitely would not satisfy in any manner the requirements of this section unless both the statute and the issue were very narrow

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[2] Legislative History Administrative Procedure Act, Senate Document No. 248, 79th Congress, Second Session, p. 367.

indeed. Almost any case of consequence involves numerous and detailed issues of law, fact, and discretion. These must all be determined as a part of the decision. Only in that manner are the parties protected and assured that the case has been fully and completely considered and determined."

The duties imposed upon a reviewing Court by Section 10(e) of the Act were stated by Senator McCarran[3] in the following language:

"* * * The enforcement of the bill by the independent judicial interpretation and application of its terms is a function in which the final analysis is clearly conferred upon the Courts.

Therefore, it will be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used in so far as they have not been defined in the bill itself."

Substantiality of Evidence

The issues raised by Appellants before the District Court did not initially present a question involving the "substantiality of evidence" phase of the Rule of Administrative Finality, which phase was of concern to this Court in the *Universal Camera* Case. There is no reason to believe, however, that this latter decision does not apply with equal force to the "adequate findings" phase of this Rule. The initial question, as heretofore stated, was whether or not the Commission had made the basic, essential or "quasi jurisdictional" findings necessary to support its Order. Even if adequate findings can be considered to exist, which Appel-

[3] P. 2159, Congressional Record, Volume 92, Part 2, 79th Congress, Second Session.

lants deny, the District Court erred in applying the incorrect standard of judicial review in considering the substantiality of the evidence presented to the Commission.

In weighing the substantiality of evidence supporting the Commission's findings, the District Court was required to review and consider the entire record, including the evidence opposed to the Commission's action, and if the evidence demonstrated that the Commission was wrong or that its Order was against the weight of the evidence, it was required to hold the Order invalid. *Universal Camera Corp. v. N. L. R. B.*, Supra. In this case, the District Court has completely ignored the only evidence of record on the question of the dormancy of the Neale rights between Baltimore, Md., and Washington, D. C., namely, the stipulation by counsel that Neale had never claimed to have conducted any such operations except under the abortive interchange arrangement with Quinn. The District Court has, moreover, failed to give consideration to the evidence of record and findings of the Commission relating to this interchange arrangement which resulted in the Commission's conclusion that operations thereunder were not those of Neale. Further the Court failed to consider the absolute lack of evidence necessary to support a finding that a public need warranted the reinstitution of the dormant Neale operation and failed also to give proper consideration to the overwhelming evidence and the findings adopted by the Commission that protesting carriers are performing a completely satisfactory transportation service.

The District Court has clearly misconceived its duty as a reviewing court and its judgment must be held to be erroneous.

Materiality of Dormancy Issue

If the District Court had not misconceived its duty as a Court reviewing the validity of a Commission Order and had the Commission consequently been required to comply with the provisions of the Administrative Procedure Act with respect to the issue of the dormancy of the Neale rights, an Order denying approval of the proposed transaction would have been necessitated.

The question of dormancy has been raised in many proceedings before the Commission and as a result definite principles of law have emerged governing the transfer of dormant certificates. Since 1948, the Commission has consistently held that where a proposal to transfer a dormant motor carrier certificate or a certificate under which the purchaser proposed to perform a service different from that performed by the seller, a showing of public convenience and necessity warranting the new operation must be made to substantiate a conclusion of consistency with the public interest. In developing this principle of law, the Commission has adopted an unvarying requirement that a finding of public convenience and necessity warranting the new service is an essential finding which must be made before such certificates can be transferred under Section 5. This principle has been approved by the District Courts and by per curiam decisions of this Court. *Herrin Transportation Co. v. U. S. et al.* (1952) 108 F. Supp. 180; affirmed per curiam 73 S. Ct. 479 (1953); *Shein et al. v. U. S. et al.* (1951) 102 F. Supp. 320; affirmed per curiam 343 U. S. 944.

Since the Commission decision in the Herrin case in September, 1951, approved subsequently by a District Court and per curiam by this Court, the Commission has extended this principle to the proposed transfer of a cer-

tificate under which operations had been only partially conducted, holding that as a condition precedent to the transfer of such a certificate, the dormant portion thereof was required to be submitted for cancellation. *Louis Kletter — Control — Eastern Freight Ways, Inc. — Purchase — Cole*, May 6, 1953, MC-F-4518.

In *Adkins et al. — Purchase — Star Transit, Inc.*, 38 MCC 240, the Commission stated:

> "Certainly where nonoperation resulting from abandonment has continued over a substantial length of time it is apparent that questions of public convenience and necessity are involved in any resumption of service over the routes and between the points concerned; and these questions of convenience and necessity are not affected by the continuance in existence of unused operating rights. *Turner v. State*, 76 Pac. (2d) 254. Where the period of nonoperation is less, the questions of public convenience and necessity involved in any proposed resumption may be of less significance, but they are nevertheless present."

In *Smith and Solomon Trucking Co. — Purchase (Portion) — Reisch Trucking and Transportation Co., Inc.;* MC-F-4588; June 11, 1951, the Commission stated:

> "It is obvious from the foregoing conclusions in the P. I. E. case that the dormancy of the considered rights is of serious concern to us and intervenors and that we may, indeed, it is our duty to, weigh the effect of the proposed resumption of operations on intervenors ability to continue providing the public with adequate service and to maintain their financial stability. In weighing such effect, we may, and certainly should, consider, if our conclusions are to have any substance, whether there is a public need for the institution of what would constitute a new service."

In *Motor Cargo, Inc. — Purchase — Ray Williams Freight Lines, Inc.*, 58 MCC 87:

> "* * * existing carriers are not required to show that the territory, from the standpoint of competition, has reached the saturation point, and that the additional competition which would follow approval of the transaction would be the particular competition which would convert their previously profitable operations to unprofitable operations. We have held in numerous cases that where evidence does not establish a public need for the revitalization of operations under rights which little or no operations have been conducted, existing carriers which have expended funds and energy in developing facilities to handle available traffic and are handling the traffic satisfactorily, are entitled to protection against the establishment of what would amount to a new and vigorous service in competition with them, and that such protection should be afforded not only for the protection of the carriers themselves, but to promote stability and sound economic conditions in the industry and the rendition of adequate transportation to the public. From the standpoint of consistency with the public interest, we see little difference, as a practical matter, between the transaction here proposed and those disapproved in *Central N. Y. Freightways, Inc. — Purchase — Gorea's M. Exp., Inc.*, 55 MCC 390 and *LaMere and Conroy — Purchase — Ziffrin Truck Lines, Inc.*, 55 MCC 501."

In *Pacific Intermountain Express Co. — Purchase — Browning Freight Lines, Inc.*, MC-F-4917, October 13, 1952:

> "The evidence demonstrates that the proposed unified service would be convenient and advantageous to the supporting consignors and consignees, but fails to show an actual need therefor, the standard of proof required when the selling carrier's operations have been limited, sporadic, inactive, or dormant. *LaMere*

and Conroy — Purchase — Ziffrin Truck Lines, Inc., 55 MCC 501. Approval of the transaction would result in the entry into the considered territory of a strong competitor whose service would be essentially different from that normally performed by vendor."

Appellants contend that the term, "public need" as used in the above decisions is synonymous with the clause, "public convenience and necessity". One of the elements necessary to establish public convenience and necessity is the showing that existing carriers are not performing an adequate service. In *Hudson Transit Lines v. U. S.*, 82 Fed. Supp. 152, affirmed per curiam, 338 U. S. 802, the United States District Court for the Southern District of New York, set aside a portion of a Commission order granting a certificate of public convenience and necessity for the reason that the Commission's conclusions were not supported by adequate findings and substantial evidence. In remanding the case to the Commission, the Court made the following statement with respect to public need:

> "The Commission has frequently held that under s. 207 of the Act, 49 U. S. C. A. s. 307, there must be an affirmative showing not only that a common carrier service is required in the convenience of the public, but also that it is a necessity, and that the latter element includes a showing that present facilities are inadequate. *Pan-American Bus Lines*, Operation, 1 MCC 190, 203; *Bluenose Bus Co., Ltd., Common Carrier Application*, 1 MCC 173, 176; *Richard L. Richards, Extension*, 6 MCC 80, 81; *Ohio Transportation Co., Common Carrier Application*, 43 MCC 247, 259. The courts, too, have recognized inadequacy of existing facilities as a basic ingredient in the determination of public 'necessity.' *Inland Motor Freight v. United States*, 60 F. Supp. 520, 524 (E. D. Wash.). See also, *I. C. C. v. Parker*, 326 U. S. 60, 69-70 and dissenting opinion of

> Mr. Justice Douglas at p. 74. This does not mean that the holder of a certificate is entitled to immunity from competition under any and all circumstances. *C. & O. Ry. Co. v. United States,* 283 U. S. 35. The introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service without being unduly prejudicial to the existing service. *I. C. C. v. Parker,* supra. No such finding has been made nor is there any evidence to support such a finding."

In the instant case, there was an affirmative showing by Appellants that their facilities were adequate and satisfactory and the Commission made a finding to this effect. This finding, of itself, was sufficient to warrant a denial of the proposed transaction if the Commission had not initially erred in refusing to make findings and conclusions on the material issue of the dormancy of the Neale Baltimore-Washington operation.

Although the Commission was presented with an application covering the transfer of two separate operating authorities, it treated the entire matter as a single transaction. It found that what Quinn was proposing to purchase, as an entity, was sufficient operating authority to enable it to extend its operations to Richmond, Va. and the entire transaction was conditioned upon the approval of the vital Baltimore-Washington link. Although the Neale certificate permits operations between other points, the only portion of this certificate which was at all pertinent to the transfer proceeding in the eyes of both Quinn and the Commission, was the authority granted to Neale to conduct operations between Baltimore and Washington. Without this link, the entire transaction would fall.

The materiality of the issue, Appellants contend, has been amply demonstrated and the Commission, being bound by the requirements of Section 8 (b) of the Administrative Procedure Act, was required to make findings and conclusions on this issue. The only possible explanation of the failure of the Commission to make these findings and conclusions is that it considered the issue immaterial.[4] Appellants contend that it is a complete distortion of the clear intent of the Administrative Procedure Act to hold that the Commission, by the simple expedient of concluding that an issue raised on the record is immaterial, may ignore the provisions of this Act and refuse to make findings and conclusions on this issue. Such a holding would completely defeat the Congressional intent inherent in this Act in that it would leave to the Commission's sole discretion the determination of whether or not the Act is applicable on any given issue.

The District Court evidently was in agreement with Appellants' contention in this regard because it determined that the Commission had made findings and conclusions on this dormancy issue. However, as heretofore demonstrated, the statements relied on by the District Court, in this regard, were not intended to be and cannot, under any possible interpretation, be construed as findings or conclusions on this issue.

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[4] By Order of the full Commission dated July 21, 1952, (Plaintiffs' Exhibit 5), the following disposition was made of Appellants' Petition for Reconsideration: "And it further appearing, that the material matter set forth in Protestant's Petition have been considered by Division 4 and discussed in the said Report, that no material fact or argument that warrants reconsideration has been presented, *it is further ordered*, that the Petition be, and it is hereby denied.

Errors in the Motion to Affirm

A reading of the Motion to Affirm filed on behalf of the Commission and the United States reveals that this Motion so closely follows the District Court's Opinion that it is subject to the same allegations of error that Appellants have made with respect to the Court's Opinion. Consequently, it is unnecessary to specify in detail the errors contained in this Motion or to answer each separately.

It is important to note, however, that Counsel for the Commission and the United States now rely upon operations conducted under the interchange arrangement with Quinn as constituting operations by Neale between Baltimore and Washington. The obvious error of this position and the present inconsistency of the Commission is emphasized by the fact that the Commission, itself, in the Report of April 25, 1952 stated that this interchange arrangement between Quinn and Neale was "not consonant" with the rules prescribed in *Lease and Interchange of Vehicles by Motor Carriers*, 52 MCC 675. This very Lease and Interchange proceeding referred to by the Commission was before this Court recently and received approval as to its validity. It is indeed startling to have the Commission claim, as it has in its Motion to Affirm, that an interchange arrangement not in accord with these same rules is, nevertheless, a valid interchange arrangement, constituting an operation by Neale.

Moreover, on page 2, footnote 2, of the Motion to Affirm, the following statement is made in support of the argument that a finding was made on the issue of the dormancy of the Neale rights between Baltimore and Washington: "As the District Court noted, the Commission expressly found that Neale had made a large number of interchange shipments

between Baltimore and Washington-Virginia in 1950 and 1951, and that, despite the interchange arrangement, *these operations* at all times had been "actively and consistently conducted under Neale's certificate." (Emphasis supplied.) This statement makes it appear that Neale had conducted operations between Baltimore and Washington irrespective of the interchange arrangement with Quinn, and is, therefore, a positive misstatement both of the finding of the Commission as stated by the District Court, and of fact, the fact being as heretofore shown, that the only operations Neale claimed to have conducted between Baltimore and Washington were under the abortive interchange arrangement with Quinn, and no others.

In essence, the Motion to Affirm demonstrates an attempt to avoid the issues raised by Appellants before the Commission, the District Court and through this Appeal, and should be so considered by this Court. Further, it demonstrates another attempt to gain judicial support for the Commission's refusal to abide by the provisions of the Administrative Procedure Act, and for judicial sanction of the Commission's apparent wish not to be governed by its prior decisions, which heretofore have been upheld by this Court at its request.

V. CONCLUSION

The issues in this proceeding are of vital importance to Appellants and to the motor carrier industry generally. Appellants have invested tremendous sums of money in equipment and other facilities to serve the shipping public in the area in which they are authorized to operate. The approval of the instant transaction will place in direct competition with them a new carrier who will be authorized to perform not only an overhead operation between Boston,

Mass. on the one hand, and Washington and Richmond and points intermediate thereto on the other, but will also permit this new carrier to perform, for the first time, direct competitive service between such points as New York, N. Y., Philadelphia, Pa., Wilmington, Del., and Baltimore, Md., on the one hand, and, on the other, Washington, D. C., Richmond, Va. and points intermediate thereto.

Appellants would not be before this Court had the Commission performed its duty, as required by law, or had it treated the Quinn application as it has treated all similar applications since 1948, or even had it given Appellants any reason for departing from its well settled principles, which principles it has now made more extensive of application, or, in the final analysis, had the District Court applied a proper standard of review in its determination of the validity of the Commission action herein complained of.

This decision of the District Court cannot be allowed to stand. It cannot be allowed to stand because it is judicial authority for the position taken by the Commission that it may ignore the requirements of Section 8 (b) of the Administrative Procedure Act. This decision cannot be allowed to stand because to permit the same would be to acquiesce in the application by this District Court of an incorrect standard of judicial review in determining the merits of any complaint brought before it from any government agency. Further, this decision of the District Court cannot be allowed to stand for the reason that it has brought about an embarrassing conflict among the several District Courts with respect to the proper standard of judicial review required, as has hereinabove shown. Finally, this decision of the District Court cannot be allowed

to stand because it permits grievous harm to Appellants in that it sanctions a Commission order which permits Quinn to invade an area satisfactorily served by existing carriers without subjecting it to the same standards of proof and principles of law which have been consistently applied to all other carriers,[5] including Appellants.

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[5] In *Boyce Motor Lines, Inc. — Purchase (Portion) — Vollmer Transportation, Inc.*, MC-F-5112, a transaction practically identical with the one proposed in the instant case was involved. The Examiner's proposed Report issued in this proceeding on October 15, 1953, well illustrates the legally correct manner in which transactions of this character should be judged by the Commission and its Examiners when proper scope is given to the Administrative Procedure Act. In this case, Boyce held operating authority between Buffalo and Niagara Falls, N. Y., and Philadelphia, Pa., serving Albany, N. Y., as an intermediate point. It proposed to purchase a portion of Vollmer's certificate permitting operations between Albany, N. Y., and New England points for the purpose of providing a single-line service between points in N. Y., in the Buffalo, Niagara Falls area, on the one hand, and New England points, on the other. (Quinn proposes to purchase the Neale and Wadkins' authorities for the purpose of providing single-line service between Massachusetts points, on the one hand, and Washington, D. C., and Richmond, Va., and points intermediate thereto, on the other.) Vollmer had conducted operations under its certificate between points in New York west of Albany and New England points but had never performed any service between Albany and New England points. (Neale had conducted operations between Baltimore, Md., and Reedsville, Va., and other Va. points but had never conducted any operations between Baltimore, Md., and Washington, D. C.) The portion of the Vollmer authority sought to be acquired connects with the Boyce authority at Albany. (The Neale authority connects with the Quinn authority at Baltimore and with the Wadkins authority at Washington.) Protestants requested a finding that Vollmer had never conducted operations between Albany and New England points. The Examiner made such a finding. (Appellants requested a finding that Neale had never conducted operations between Baltimore and Washington. The Commission refused to make such a finding.) Nine shippers or receivers of freight appeared in support of the application, all of whom desired a single-line service by Boyce between New York points west of Albany, on the one hand, and New England points, on the other. (Five shippers testified in support of the Quinn application, all of whom desired single-line service by Quinn from Massachusetts points, on the one hand, and on the

Appellants respectfully submit that the questions presented by this appeal are of vital importance to them, to the motor carrier industry, generally, and to all persons and industries who must, of necessity, apply to the District Court for the District of Maryland for judicial review of the actions of administrative agencies. Appellants respectfully submit that the District Court has applied an incorrect standard of judicial review and has improperly construed the decision of this Court in the *Universal Camera* case,

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other, Washington, D. C., and Virginia points.) The Examiner found, "Vollmer's past operations have been substantial and as operated by it represents valuable properties with considerable good-will and going concern value." However, no operations have been conducted between Albany and New England points. (The Examiner and Commission found "* * * that operations have at all times been actively and consistently conducted under Neale's certificate * * *." No operations were conducted by Neale between Baltimore and Washington but the Examiner and Commission failed to make this finding.) The Examiner found that the carriers operating between Albany and New England points, "are providing an adequate and efficient service." (The Examiner and Commission found, "There is no evidence of any dissatisfaction with or deficiency in the service of the opposing carriers (Appellants). They are capable of handling additional traffic.") The Examiner found, "Boyce is, therefore, required to meet the burden of showing that the purchase of operating rights under which no operations have been performed wholly between the points between which it would institute operations would be responsive to a public need." (No such finding was made in the instant proceeding.) The Examiner found, "* * * should the transaction be approved, a restriction should be imposed against any service by Boyce solely between Albany and the New England points." (No such finding was made in the instant proceeding.) The Examiner found, "Some, but not all, of the remaining protesting carriers would be injured by the new service Boyce proposes." (In the instant case, the Examiner and Commission found, "It is quite likely that Vendee (Quinn), an aggressive carrier, will divert some freight from competitors.") The Examiner concluded: "Yet they have shown that the total service available and being rendered by them adequately meets all reasonable public need in the territory. Boyce has, therefore, failed to sustain the burden imposed and the Commission should find that the application should be denied." (In the instant case, the Examiner and Commission concluded that the transaction should be approved.)

supra, and review of this decision is, therefore, imperative. For the reasons shown the joint motion of the United States and the Interstate Commerce Commission to affirm should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing reply brief was served upon counsel for the parties by mailing a true copy of said brief to such counsel this 19th day of October, 1953.

JAMES J. DOHERTY.

COPY

FILED
DEC 15 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 409

THE BALTIMORE TRANSFER COMPANY, DAVIDSON TRANSFER AND STORAGE COMPANY, COCHRANE TRANSPORTATION COMPANY, BROOKS TRANSPORTATION CO., INC., EAST COAST FREIGHT LINES, INC., AND BRISTOW LINES, INCORPORATED,
Appellants,

VS.

INTERSTATE COMMERCE COMMISSION
AND
UNITED STATES OF AMERICA,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

PETITION FOR REHEARING

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

PETITION FOR REHEARING

I. INTRODUCTION

Pursuant to Rule 33, as amended, of the revised Rules of the Supreme Court of the United States, Appellants, the Baltimore Transfer Company, Davidson Transfer and Storage Company, Cochrane Transportation Company, Brooks Transportation Co., Inc., East Coast Freight Lines, Inc. and Bristow Lines, Incorporated petition the Court for a rehearing of the above entitled case.

II. STATEMENT

The appeal in this case is from a judgment of the United States District Court of the District of Maryland dismissing Appellants' complaint seeking to set aside an Order of the Interstate Commerce Commission. A joint motion to affirm was filed on behalf of the United States and the Interstate Commerce Commission, and on October 19, 1953, a brief of Appellants, in opposition to this joint motion to affirm, was filed. On November 30, 1953, this Court granted the joint motion and affirmed the judgment of the United States District Court for the District of Maryland.

III. GROUNDS FOR PETITION

The District Court Committed Errors Requiring Reversal Of Its Judgment.

Appellants' appeal from the judgment of the United States District Court is under those statutory provisions providing for a direct appeal to this Court in cases involving the validity of Orders of the Interstate Commerce Commission. Appeal in this manner is the exclusive remedy available to Appellants to secure relief from an Order of the Interstate Commerce Commission which they unqualifiedly allege is invalid, and from a judgment of the United States District Court which erroneously upholds this invalid Order. Appellants respectfully and vigorously urge that, irrespective of any other considerations, on a direct appeal of this character, it is mandatory upon this Court to grant a rehearing on this appeal if the District Court has committed such error as would require reversal under ordinary Appellate procedure. Any other treatment of this appeal would deny Appellants due process of law in that they are prohibited by statute from pursuing ordinary Appellate procedure, that is appeal to the Circuit

Court of Appeals. Appellants allege that the District Court has, in fact, committed errors in this case which clearly require a reversal of its judgment and that, therefore, a rehearing and reconsideration of this appeal by this Court is warranted and necessary.

Section 10 (e) of the Administrative Procedure Act provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be * * * (1) arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law * * * (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 * * *."

Section 8 (b) of the Administrative Procedure Act provides "all decisions * * * shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons and basis therefor upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Appellants contend that in this case, the Commission failed to include a statement in its Report of "findings and conclusions, as well as the reasons or basis therefor," upon a "material issue of fact, law, or discretion presented on the record" as this agency was required to do by Section 8 (b).

The District Court erroneously failed to hold unlawful and set aside the decision of the Interstate Commerce Commission complained of, such decision being in direct violation of the provisions of Section 8 (b) as that section is cited hereinabove.

The District Court Erroneously Determined That The Interstate Commerce Commission Had Made Findings And Conclusions On The Material Issue Of The Dormancy Of The Neale Rights.

In the hearing of this case before the District Court Appellants alleged that the Interstate Commerce Commission had failed to make findings and conclusions upon the material issue of the dormancy of the Neale rights between Baltimore, Maryland and Washington, D. C. The entire transaction which was before the Interstate Commerce Commission for its consideration was conditioned upon the approval of these rights. The District Court and this Court have no proper concern with what the ultimate Commission decision might have been had it made the required finding. The only question for consideration is whether or not the Commission has made a finding on the issue which can be supported by substantial and relevant evidence contained in the record.

In answer to this allegation, the District Court stated:

> "Other points stressed by the Plaintiffs are that the Commission failed to make any finding or conclusion with respect to the alleged dormancy of the Neale rights between Baltimore and Washington * * * However, the Commission did make findings and conclusions on both of these points * * *"
>
> (The other point referred to by the District Court is not pertinent to this appeal.)

As findings and conclusions on this issue, the District Court cited the following excerpt from the Report of the Interstate Commerce Commission:

> "Traffic was interlined at Baltimore with vendee (Quinn) and other carriers. Vendee commenced interchanging with the administratrix in March of 1950,

several months after executing the agreement to purchase the rights. According to an exhibit filed after the hearing, they interlined at Baltimore 416 shipments during the first six months of 1951, of which 366 consisted of paper moving from Lawrence, Mass., to Washington, 49 of skids from Washington to Lawrence, and 1 of oysters from Kilmarnock, Va., to Boston. Of the total shipments, 381 were transported from the point of origin to the point of destination in vendee's vehicles operated by its drivers. As to the remaining 35 shipments, the association's counsel, who examined the underlying data, assumes that the payments made by vendee to the administratrix were 'for the use of the Neale rights,' and not for actual transportation by the latter. It is clear that there was no genuine interchange in respect of the 381 shipments and that the arrangements between applicants were not consonant with the rules prescribed in *Lease and Interchange of Vehicles by Motor Carriers*, 52 M. C. C. 675. Moreover, such arrangements were initiated after the agreement to purchase. *The fact remains, however, that operations have at all times been actively and consistently conducted under Neale's certificate without regard to the above arrangements with vendee.*" (Emphasis supplied by District Court.)

Appellants state categorically that the Commission *did not* make findings and conclusions on this material issue. The excerpt of the Report of the Interstate Commerce Commission construed by the District Court to constitute such findings and conclusions has absolutely no reference to the issue of dormancy raised by Appellants. This excerpt refers exclusively to an interchange arrangement between Neale and Quinn, which arrangement was held to be invalid by the Commission, and to operations by Neale between points *other than Baltimore, Md. and Washington, D. C.* The *only* evidence of record relating to the question of whether or not Neale had conducted operations between Baltimore, Md. and Washington, D. C. was a stipulation

entered into by Counsel for Quinn Freight Lines and for Appellants that *Neale had never conducted operations between Baltimore, Md. and Washington, D. C.* except those attempted under the interchange arrangement with Quinn, held to be invalid by the Commission, which were illegal operations of Quinn and not those of Neale. The District Court completely ignored this stipulation although this portion of the record was repeatedly cited by Appellants for its consideration in accordance with Section 10 (e) of the Administrative Procedure Act.

Appellants repeat that no findings and conclusions on this issue were made by the Commission and the District Court's determination to the contrary constitutes prejudicial and reversible error for the correction of which appeal to this Court is the exclusive remedy available to Appellants. A correct determination by the District Court, namely, that the Commission did not make findings and conclusions on this issue would have required a remand of the case to the Commission to make appropriate findings and conclusions. Had this been done, the rights of Appellants would have been protected, but because of this error, irreparable damage has resulted to them.

Section 8 (b) of the Administrative Procedure Act required the Commission to make the requested findings and conclusions. The issue raised by Appellants was a material issue and was recognized as such by the District Court, in it's Opinion and by the United States of America and the Interstate Commerce Commission in their joint Motion to Affirm.[1] The Commission's failure to make the requested

[1] On page 2 of the joint Motion to Affirm, there appears the following language as a footnote:

"There is no merit to appellants' contention that the Commission failed to make findings on the 'basic and material' issues of (1) the

findings and conclusions and the District Court's upholding of this failure constitutes reversible error.

The District Court's Rule Of Judicial Review Is In Conflict With The Rule Adopted By Other District Courts And By This Court.

The District Court, in its Opinion, makes the following statement:

> "The Administrative Procedure Act (5 U. S. C. A. Secs. 1001 et seq.) has not altered the rule of administrative finality."
>
> Universal Camera Corporation v. National Labor Relations Board, 340 U. S. 474.

Appellants have already stressed the erroneous construction placed by the District Court upon this Court's decision in *Universal Camera Corporation v. National Labor Relations Board*. This decision clearly establishes a vastly different rule of judicial review than that adopted by the District Court.

Since the filing of their brief in opposition to the joint Motion to Affirm, a Three Judge Statutory Court decision has been reported in *Coyle Lines, Incorporated, et al v. United States of America, et al* (U. S. District Court, Eastern District of Louisiana, New Orleans Division), 115 F.

'dormancy' of Neale's rights between Baltimore and Washington (assignments of error 18-28), and (2) the alleged invalidity of Quinn's interchange with Neale (assignments of error 30-34). As the district court noted, the Commission expressly found that Neale had made a large number of interchange shipments between Baltimore and Washington — Virginia in 1950 and 1951, and that, despite the interchange agreement, *these operations* at all times had been 'actively and consistently conducted under Neale's certificate'." (Emphasis Supplied.) (As heretofore noted, the interchange arrangement referred to was held to be invalid and no Baltimore-Washington operations were ever conducted by Neale except those attempted under this invalid interchange arrangement.)

Supp. 272. This case involved the validity of an Order of the Interstate Commerce Commission, granting a certificate of public convenience and necessity to a common carrier by water. In this decision, the District Court stated:

> "Before undertaking a consideration of these questions, reference should first be had to the scope of the judicial review of orders of the Interstate Commerce Commission. It seems clear that the scope of the *judicial review of administrative proceedings may have been broadened to some extent by the Administrative Procedure Act.* (Emphasis Supplied.) Whereas formerly an administrative order was valid if supported by substantial evidence, now the touchstone of validity is 'substantial evidence on the record considered as a whole'."

A comparison of the interpretations placed upon the *Universal Camera Case* and the provisions of the Administrative Procedure Act by the District Court of Maryland and the District Court of Louisiana makes it obvious that these two courts are in direct conflict. At an irreducible minimum, the *Universal Camera Case* and the Administrative Procedure Act require a reviewing court to consider the *entire* evidence of record, including the evidence opposed to the Commission's action.

The District Court in the instant case gave absolutely no consideration to the *only* evidence of record bearing on the issue, that Neale had never conducted any operations between Baltimore and Washington except those attempted under the invalid interchange arrangement with Quinn, which were illegal operations of Quinn and not of Neale. This evidence was opposed to the validity of the Interstate Commerce Commission's action and consideration thereof was crucial to a proper determination of the issues raised. The Court's failure to consider it was contrary to the pro-

visions of the Administrative Procedure Act and the requirements laid down by this Court in the *Universal Camera Case* and constitutes reversible error.

The District Court's Determination That Findings Adequate To Support A Conclusion Of Consistency With The Public Interest Had Been Made By The Commission Is In Error.

The statutory provisions applicable to the proceeding in question require the Commission to find that the proposed transaction will be "consistent with the public interest" before the transaction can legally be approved. The "public" referred to in these statutory provisions obviously means that segment of the public which might conceivably have some interest in the result of the particular proceeding before the Commission. In this case, it is clear, for example, that the "public" does not include a shipper who might desire transportation service between Chicago, Illinois and Milwaukee, Wisconsin. The "public" contemplated are those who, on the basis of the record before the Commission, might conceivably have some need for Quinn's services if the transaction were approved.

The entire basis for the District Court's determination that the Interstate Commerce Commission made adequate findings to support an ultimate conclusion that approval of the proposed transaction would be consistent with the public interest consists of a determination that such approval would permit Quinn to eliminate the necessity of interchange arrangements in transporting freight *from Massachusetts points to points south of Baltimore, Md. and Washington, D. C. The entire evidence of record relates exclusively to such an operation.*

However, the approval granted by the Commission in this case will permit Quinn to perform operations not even

remotely connected with the "public" interested in this transaction as to which "public" exclusively the statutory test of "consistency with the public interest" is required by law to be applied. There is not a scintilla of evidence in the entire record to support a conclusion that it would be consistent with the interest of that segment of the "public" desiring transportation service between points such as Baltimore, Md. and Washington, D. C.; Baltimore, Md. and Richmond, Va.; New York, N. Y. and Richmond, Va. and Philadelphia, Pa. and Richmond, Va. to permit Quinn to perform such operations. The Commission, itself, found that the services conducted by Appellants between these specified points were adequate and more than sufficient to serve the "public" desiring transportation service between these points.

From consideration of the practical facts of transportation problems, such as outlined above, the Interstate Commerce Commission has developed principles of law requiring the elimination of dormant portions of certificates proposed to be transferred. Obviously, it cannot be consistent with the public interest to permit the transfer of a certificate, or portion thereof, which has been dormant for a long period of time unless it can be shown by members of the "public" desiring to use such dormant service that they, in fact, need it. The operations of Neale herein complained of have, in fact, been dormant. There has been absolutely no showing by any member of the "public" desiring transportation service between Baltimore, Md. and Washington, D. C., or between any of the other cities referred to above, to warrant a conclusion that the institution of the service proposed by Quinn would be "consistent" with their interests.

The very essence of Appellants' contention in this case rests in a proper consideration of the above. Had the District Court given proper consideration to these contentions, it would have reached a conclusion different from that set forth in its Opinion. Its failure to do so clearly constitutes reversible error.

WHEREFORE, Appellants respectfully pray that this Honorable Court rehear and reconsider its judgment in this case and for the reasons set forth herein and in their brief in opposition to the joint Motion to Affirm, deny the said Motion and, on hearing, reverse the judgment of the United States District Court for the District of Maryland.

Respectfully submitted,

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AFFIDAVIT

I hereby certify that on this 14th day of December, 1953, before me, a Notary Public in and for the City of Baltimore, State of Maryland, personally appeared James J. Doherty, Counsel for Appellants, and made oath in due form of law that the within Petition for Rehearing filed on behalf of Appellants is presented in good faith and not for delay.

BARBARA MATTER,
Notary Public.

My Commission Expires May 2, 1955.

(Seal)

No. 409. BALTIMORE TRANSFER CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. Appeal from the United States District Court for the District of Maryland. *Per Curiam:* The motion to affirm is granted and the

judgment is affirmed. *James J. Doherty* and *William Hoffenberg* for appellants. *Acting Solicitor General Stern* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission, appellees. Reported below: 114 F. Supp. 558.